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No. 01-1806

In the Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
***ex rel.* JAMES E. RYAN, Attorney General of Illinois,**

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., an Illinois business corporation; ARMET INC., an Illinois corporation; and RICHARD TROIA, Individually and as an Officer, Director and Fiduciary of TELEMARKETING ASSOCIATES, INC.; and ARMET INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Illinois Supreme Court correctly hold that the Illinois Attorney General's amended complaint failed to state a claim for fraud or breach of fiduciary duty because the First Amendment to the United States Constitution bars such a claim based solely upon allegations that professional fundraisers earned gross fees which the Illinois Attorney General considered excessive and their gross fees were not voluntarily disclosed to potential donors?

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STATUTES INVOLVED

The Illinois Attorney General's ("Attorney General") brief omits reference to the statutory provisions he raised in his Amended Complaint:

- Sections 9(c), 15(a) and 15(b)(5) of the Illinois Solicitation For Charity Act, 225 ILCS 460/9(c), 15(a), 15(b)(5)
- Sections 1 and 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/1, 2
- Uniform Deceptive Trade Practices Act ("UDTPA"), 815 ILCS 510/2.

Also relevant is Section 18(c) of the Illinois Solicitation For Charity Act, 225 ILCS 460/18(c).[1]

[1] Pursuant to United States Supreme Court Rule 24(1)(f), these statutory provisions may be found at Appendix A.

STATEMENT OF THE CASE[2]

Respondents Telemarketing Associates, Inc. ("Telemarketing") and Armet Inc. ("Armet") are companies that provide professional fundraising services for charitable organizations. Respondent Richard Troia ("Mr. Troia") is the owner and an officer and director of these companies (collectively the "Fundraisers"). Telemarketing entered into arms-length contracts with an independent charitable organization, Vietnow National Headquarters, Inc. ("Vietnow"), an Illinois-based, not-for-profit corporation with charitable purposes. Vietnow, which was not a party to this suit, was organized in 1984 and is associated with an Illinois state chapter and 26 Illinois local chapters. Vietnow also operates as the national organization for several State organizations. (Amended Complaint ("AC") ¶8; R. Vol. I, C-4).[3] Vietnow's Articles of Incorporation show that its purposes include "to help increase community

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[2] Because the Circuit Court granted the Fundraisers' motion to dismiss, the Statement of Facts is based on the Attorney General's Amended Complaint which incorporated his original Complaint. A motion to dismiss under Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, accepts all well-pled facts but not conclusions of law or factual conclusions which are unsupported by allegations of specific facts in a plaintiff's complaint. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 490, 675 N.E.2d 584 (1996). Nothing in this Statement of the Case should be treated as an admission by the Fundraisers. Citation to the record on appeal ("R") will be to the volume of the record ("Vol.") and the individual page at which the citation may be found ("C-__").

[3] The Attorney General incorporated and realleged his original Complaint, R. Vol. I, C-2-113, in his Amended Complaint. Therefore, paragraphs 1-47 of the Amended Complaint are actually citations set forth in the original Complaint. (R. Vol. I, C-2-14).

awareness of the problems and readjustments encountered by the Vietnam veteran and his family" and "to demonstrate to our community that Vietnam veterans are a vital resource." (AC Ex. A; R. Vol. I, C-17).

Telemarketing is registered as a professional fundraiser in Illinois and has filed financial information and reports. (AC ¶¶17, 22 & Ex. D; R. Vol. I, C-6, 8, 87-111). Beginning in 1987, Telemarketing entered into three separate contracts with Vietnow to act as a professional fundraiser and solicit charitable donations from the public on behalf of Vietnow. (AC ¶¶11, 49[4] & Exs. B, G; R. Vol. I, C-5, 21-28, 208, 214-18). In these contracts Vietnow expressly agreed that Telemarketing was to receive 85% of the gross receipts it collected from charitable solicitations on behalf of Vietnow in Illinois. (AC ¶¶11, 49, Exs. B, C, G; R. Vol. I, C-4-5, 23, 27, 216).

Regarding Armet, since 1989 Armet acted as the broker in obtaining third party professional fundraisers to conduct out-of-state fundraising for Vietnow. Under these contracts, the third party fundraisers were to receive 70-30% of the funds solicited, Armet was to receive 10-20% as the finder of these fundraisers and Vietnow was to receive the remaining 10%. (AC ¶12 & Ex. C; R. Vol. I, C-5, 29-67). The Fundraisers' relationship with Vietnow was solely contractual, professional and independent. The Attorney General made no allegation that the Fundraisers at any time had an ownership interest in Vietnow or played any role in manag-

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[4] In his Amendments to Complaint submitted December 4, 1996, R. Vol. II, C-319-26, the Attorney General renumbered what had been paragraphs 47A-47C and 67D-67O of his earlier Amendments to Complaint submitted June 25, 1996 as paragraphs 48-62 of the Amended Complaint. Paragraph 47B (R. Vol. I, C-208) therefore became paragraph 49 of the Amended Complaint.

ing or operating Vietnow. (AC Ex. A; R. Vol. I, C-17-20). As the Illinois Supreme Court found:

> Vietnow does not complain that it did not receive the amounts for which it contracted, and there is no suggestion that defendants have not fully complied with the terms of their contracts. Further, Vietnow has never expressed dissatisfaction with the fundraisers and *there is no allegation that defendants made affirmative misstatements to potential donors.*

198 Ill.2d at 348 (emphasis supplied).

Further, in his Amended Complaint, the Attorney General admitted that fundraising has genuine expenses and costs. (AC ¶32; R. Vol. I, C-11). He never has denied that potential donors knew that some fundraising costs would be associated with Vietnow's solicitation. In sum, the Attorney General sued the Fundraisers because he believed the contract fee arrangement they negotiated with Vietnow was "excessive."

In 1991 the Attorney General filed his original complaint which, in 1996, he amended (together the "Complaint"). In these pleadings, the Attorney General claimed that the Fundraisers violated the Solicitation For Charity Act, 225 ILCS 460/1 *et seq*. (the "Solicitation Act"), the Consumer Fraud And Deceptive Business Practices Act, 815 ILCS 505/1 (the "Consumer Fraud Act"), and the Uniform Deceptive Trade Practices Act, 815 ILCS 510/2 (the "UDTPA"), and breached their fiduciary duty and engaged in fraudulent concealment. The Attorney General also complained that Armet violated the Illinois Solicitation For Charity Act by failing to register as a professional fundraiser with the Attorney General or ensure that the outside professionals it hired had registered (the "Registration Claim").

The Attorney General sought harsh and sweeping relief against the Fundraisers, including an order barring the

Fundraisers from charitable fundrai ing in Illinois for five years, requiring that Mr. Troia and Telemarketing forfeit any compensation they have earned, holding each of the Fundraisers liable for both compensatory and punitive damages of more than $100,000 each, requiring the Fundraisers to provide an accounting, surcharging them for monies for which they cannot fully account or which are found to have been misspent or misused as well as for all proceeds, fees and salaries paid to persons and entities that the Attorney General claims should have been registered with the state prior to engaging in fundraising, and directing the Fundraisers to help pay the state's costs in investigating and suing them. (R. Vol. I, C-14-15, 212-213; R. Vol. II, C-325-26).

The Fundraisers moved to dismiss the Attorney General's Complaint because it violated their right of free speech protected by the First Amendment of the United States Constitution. U.S. CONST. amend. I. The Fundraisers' position was based upon this Court's decisions beginning with *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) ("*Schaumburg*"), followed by *Secretary of State of Maryland v. Joseph A. Munson*, 467 U.S. 947 (1984) ("*Munson*"), and culminating in *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) ("*Riley*") (collectively the "*Riley* Line of Authority"), that unequivocally stated that charitable solicitation by professional fundraisers is protected speech entitled to the fullest First Amendment protection and that a state may not punish a fundraiser for earning a high fee or treat as fraud the fundraiser's failure to affirmatively volunteer its fee arrangement to donors.

On November 4, 1996, based upon the *Riley* Line of Authority, the trial court dismissed the Attorney General's fraud and other claims directed at the Fundraisers' fees, upheld the Registration Claim and gave the Attorney General leave to amend his complaint. The Attorney General's

amendments added allegations but asserted the Complaint in its entirety (the "Amended Complaint"). The crux of the Amended Complaint remained that the Fundraisers earned a high fee under their contracts but failed to affirmatively disclose this—exactly what the *Riley* Line of Authority forbids. The Fundraisers again successfully moved to dismiss these claims. The Registration Claim remained. Subsequently, the Attorney General voluntarily dismissed the Registration Claim and the trial court entered an agreed judgment order in favor of the Fundraisers on all claims. The Attorney General appealed.

On May 19, 2000, the Appellate Court affirmed the trial court's dismissal of the Amended Complaint. *People v. Telemarketing Assoc.*, 313 Ill.App.3d 559, 729 N.E.2d 965 (1st Dist. 2000). On November 21, 2002, after granting the Attorney General's Petition for Leave to Appeal, the Illinois Supreme Court again affirmed the dismissal of the Amended Complaint on the grounds that it is prohibited under First Amendment principles. *People v. Telemarketing Assoc.*, 198 Ill.2d 345, 763 N.E.2d 289 (2001).

SUMMARY OF ARGUMENT

The Attorney General and *Amici Curiae* claim that if the Illinois Supreme Court's decision is affirmed, unscrupulous fundraisers will have a field day in Illinois and elsewhere and that the Attorney General and *amici* States will have no means of stopping their misconduct. The Attorney General's and *amici* States' position is absolutely incorrect. Rather, all that affirmance of the decision below means is that the Attorney General and Attorneys General in other states cannot take action against professional fundraisers in violation of the First Amendment as articulated by this Court's controlling authority. Specifically, as in this case, where the Fundraisers' conduct does not include *affirmative misrepresentations*, this conduct is protected by the First Amendment. As a result, the Illinois Supreme Court's decision does not create a constitutional issue of substantial public importance left unresolved by this court's prior decisions. To the contrary, although this Court has recognized that states may use their anti-fraud provisions "to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements," *Riley*, 487 U.S. at 800, the state must be able to allege a valid fraud claim. As the Illinois Supreme Court properly concluded, this was something the Attorney General could not do.

The Attorney General's claim that the First Amendment's protection of speech does not prohibit his Amended Complaint is erroneous. There is no dispute that the Fundraisers have taken as fees what their contracts with Vietnow expressly permit, Vietnow is a sophisticated, national independent charitable organization and Vietnow has not complained about the Fundraisers' fees or the quality of their services. To the contrary, Vietnow renewed the Fundraisers' contracts repeatedly over the years and since 1987 employed the Fundraisers to do solicitation on its behalf. While Vietnow has not complained, the Attorney General

would put the Fundraisers out of business, confiscate their earnings, fine them punitive and other damages and force them to pay for the State's own investigation and lawsuit based upon the Attorney General's arbitrary judgment that the fees earned under the Fundraisers' contracts are excessive and that the Fundraisers should have volunteered their fee arrangements to donors who did not ask for this information.

As the Illinois Supreme Court recognized, this is a textbook illustration of what this Court found was an unconstitutional invasion of a charitable fundraiser's First Amendment rights under the *Riley* Line of Authority which unequivocally holds that a fundraiser cannot be penalized for earning a high fee and may not be compelled by a state to affirmatively disclose this fee to potential donors.

The Attorney General similarly errs in claiming that the Illinois Supreme Court's decision misinterpreted the *Riley* Line of Authority. Rather, it is the Attorney General who engages in such a distortion. While the *Riley* Line of Authority allows a state to enforce its fraud laws against a charitable fundraiser who makes an actual misstatement, here there is no allegation of any false statement made by any of the Fundraisers. Likewise, the Illinois Supreme Court correctly recognized that requiring the Fundraisers to affirmatively volunteer their fee arrangement with potential donors cannot, consistent with this Court's First Amendment teachings, be the basis for a suit against the Fundraisers. 198 Ill.2d at 361-362.

Finally, the Attorney General's claim that the Amended Complaint states valid fraud claims is erroneous. While the Attorney General characterizes his Amended Complaint as alleging common law fraud, in fact it alleges statutory fraud based upon the Illinois Solicitation for Charity Act, 225 ILCS 460/1 *et seq.*, the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, and the

Uniform Deceptive Trade Practices Act, 815 ILCS 510/1. No matter what the characterization, as the Illinois Supreme Court correctly found, "fraud cannot be defined in such a way that it places on solicitors the affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." 198 Ill.2d at 361.

While the Attorney General quotes the Illinois Supreme Court's observation that "this case has far-reaching implications for all fundraisers," 198 Ill.2d at 362, he distorts those implications. The Illinois Supreme Court's statement was directed toward the abrogation of the constitutional protections afforded to professional fundraisers if they could be severely punished by the Attorney General, based upon common law principles or statutory claims based upon common law principles, because, in his arbitrary opinion, the fundraiser earned too much. Specifically, the Illinois Supreme Court correctly observed that if the Amended Complaint is upheld, "all fund-raisers in this state would have the burden of defending the reasonableness of their fees, on a case-by-case basis, whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fundraiser's fee was too high." 198 Ill.2d at 362.

Contrary to the Attorney General's and *amici* States' claim, the Illinois Supreme Court's decision is not unprecedented nor inconsistent with this Court's precedent or Illinois law. To the contrary, the Illinois Supreme Court's decision properly interprets this Court's prior decisions and Illinois law. Accordingly, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE ILLINOIS ATTORNEY GENERAL'S AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR FRAUD OR BREACH OF FIDUCIARY DUTY BECAUSE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BARS SUCH A CLAIM BASED SOLELY UPON ALLEGATIONS THAT PROFESSIONAL FUNDRAISERS EARNED GROSS FEES WHICH THE ILLINOIS ATTORNEY GENERAL CONSIDERED EXCESSIVE AND THEIR GROSS FEES WERE NOT VOLUNTARILY DISCLOSED TO POTENTIAL DONORS.

A. The First Amendment Prohibits the Attorney General's Amended Complaint.

1. The Illinois Supreme Court Properly Applied Controlling Supreme Court Precedent in Finding the Attorney General's Action Infringed the Fundraisers' Free Speech Rights.

The Illinois Supreme Court correctly found that the Attorney General's Amended Complaint infringed upon the Fundraisers' constitutional rights. This Court repeatedly has held that solicitation activity on behalf of a charity is a form of free speech protected by the First Amendment to the United States Constitution. U.S. CONST. amend. I. In *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), this Court struck down on First and Fourteenth Amendment grounds an ordinance which prohibited on-street and door-to-door solicitations for contributions by any charitable organization not using at least 75% of its receipts for charitable purposes. In reaching its decision this Court emphasized that:

> Prior authorities . . . clearly establish that charitable appeals for funds, on the street or door-to-door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.

Id. at 632.

This Court repeatedly has affirmed the broad scope of First Amendment protection accorded charitable solicitation. *See e.g., United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."); *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) ("[T]he solicitation of charitable contributions often involves speech protected by the First Amendment and . . . any attempt to regulate solicitation would necessarily infringe that speech.").

This Court has made it equally clear that these constitutional rights fully apply even where charitable solicitation is done by paid professionals. *Schaumburg*, 444 U.S. at 632. As this Court noted in *Riley*:

> It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.

487 U.S. 781, 801 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964)). *Riley* stressed that a "fundraiser has an independent First Amendment interest in the speech, even though payment is received." *Id.* at 794 n.8.

Government action that would impinge on such protected speech is subject to strict scrutiny and may restrict free speech only where the restriction is precisely tailored to further a compelling state interest. *See Riley*, 487 U.S. at 799-800; *Munson*, 467 U.S. 947, 967-68 (1984); *Schaumburg*, 444 U.S. 620, 636. As the Illinois Supreme Court correctly found, the Attorney General cannot meet these strict standards.

2. Preventing Fraud Cannot Justify a State's Restrictions on Fundraisers' Fees.

This Court has made it clear that preventing fraud cannot justify a state's restrictions on fundraisers' fees. Thus, in *Schaumburg*, 444 U.S. 620, the Village, similar to the Attorney General here, complained that more than 60% of the funds collected by the Respondent, Citizens for a Better Environment, were spent for the benefit of employees and not for charitable purposes. *Id.* at 626. The Village argued that this high fee showed that the Respondent was primarily devoted to raising funds for the benefit and salary of its employees and that its charitable purposes were negligible compared with its primary objective of raising funds. *Id.* The Village further argued that the Schaumburg ordinance was "intimately related to substantial governmental interest 'in protecting the public from fraud, crime and undue annoyance,'" with the prevention of fraud being the Village's principal justification. *Id.* at 636. This Court held that these proffered justifications were inadequate and that the Schaumburg ordinance could not "survive scrutiny under the First Amendment." *Id.*

Subsequently, in *Munson* this Court reaffirmed that a state's interest in preventing fraud could justify a restriction on fundraisers' fees. In *Munson*, this Court struck down a Maryland statute that forbade contracts between charities and professional fundraisers if they provided that the fundraiser would retain more than 25% of the money collected. In so doing, *Munson* broadly held that:

> *there is no necessary connection between fraud and high solicitation and administrative costs*. A number of other factors may result in high costs; the most important of these is that charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues,

> an activity clearly protected by the First Amendment . . . .

467 U.S. at 961 (emphasis added).

Munson stressed that it is unconstitutional for a state in any context to equate the earning of a high fee by a charitable solicitor with fraud:

> The flaw in this statute is not simply that it includes within its sweep some impermissible applications *but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.*

467 U.S. at 966 (emphasis added). *Munson* explained that focusing on the percentage of a donation received by a fundraiser is not narrowly tailored to the goal of preventing fraud, as the First Amendment requires:

> That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. On the other hand, if an organization indulges in fraud, there is nothing in the percentage limitation that prevents it from misdirecting funds. In either event, the percentage limitation, through restricting solicitation costs, will have done nothing to prevent fraud.

Id. at 966-67.

Although the Attorney General acknowledges *Munson's* recognition that it is a "fundamentally mistaken premise that high solicitation costs are an accurate measure of

fraud," (AG Pet. at 7), he totally misunderstands *Munson's* implications for this suit.

As the Illinois Supreme Court emphasized, 198 Ill.2d at 354, *Munson* specifically rejected the argument raised by the Attorney General that a fundraiser's receipt of high fees means that a solicitation does not serve charitable purposes and makes the request for a donation a form of fraud. Although the *Munson* dissent similarly had argued there is an element of "fraud" if a high proportion of the funds raised by a professional fundraiser are used for fundraising, the majority appropriately found that this argument "simply misses the point." 467 U.S. at 967-68. By pursuing a fraud action on this same theory, the Attorney General likewise "misses the point."

Four years after *Munson*, in *Riley*, 487 U.S. 781, this Court again emphasized that states may not punish a fundraiser for earning a high fee. At issue in *Riley* was the constitutionality of a North Carolina statute that defined a professional fundraiser's reasonable fee according to a three-tiered schedule. Under that schedule, a fee of up to 20% of receipts collected was deemed reasonable. A fee between 20% and 30% was deemed unreasonable upon a showing that the solicitation at issue did not involve the dissemination of information or advocacy relating to public issues as directed by the charity. A fee exceeding 35% was deemed unreasonable but the fundraiser was allowed to rebut that presumption by a showing that the fee was necessary. *Id.* at 784-85. The statute also required that before an appeal for funds professional fundraisers orally disclose to potential donors the percentage of charitable contributions collected during the previous twelve months that were turned over to the charity. *Id.* at 786.

Riley held that the state's interest in preventing fraud could not support these restrictions:

> Our prior cases teach that the solicitation of charitable contributions is protected speech, and that *using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud.*

487 U.S. at 789 (emphasis added). This Court repeated that "there is *no nexus* between the percentage of funds retained by the Fundraiser and the likelihood that the solicitation is fraudulent . . . ." *Id.* at 793 (emphasis added). These broad determinations plainly embrace a common law fraud action that attempts to draw such a nexus.

Riley noted that solicitations could serve charitable purposes even when, unlike here, these do not directly generate *any* fees for the charity:

> The State presumes that the charity derives no benefit from the funds collected but not turned over to it. Yet this is not necessarily so. For example, . . ., where the solicitation is combined with advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself. Thus, a sufficient portion of the fundraiser's "fee" may well go toward achieving the charity's objectives even though it is not remitted to the charity in cash.

487 U.S. at 798-99.

Notably, Vietnow, the charity for which the Fundraisers solicited money, has a goal of public education as part of its mission. Among its charitable purposes are to "help increase community awareness about the problems and readjustments encountered by the Vietnam veteran and his family" and "to demonstrate to the community that Vietnam veterans are a vital resource." (R. Vol. I, C-17-18). The Attorney General cannot and does not take issue with these goals. He does not deny that Vietnow could expend signifi-

cant funds to do such public education itself. As *Munson* shows, it is equally lawful for Vietnow to enter into contracts to pay sums to a professional solicitor to do such education on its behalf. The First Amendment does not allow a state official to interfere with this choice.

Riley emphasized that the First Amendment prohibits a state from interfering with a charity's determination of how best to take its message to the public. *Riley*, therefore, rejected that a percentage restriction paid to charitable solicitors could be justified on the ground that charitable organizations are economically unable to negotiate fair or reasonable contracts without governmental assistance. As this Court stated:

> [T]his regulation burdens speech, and must be considered accordingly. There is no reason to believe that charities have been thwarted in their attempts to speak or that they consider the contracts in which they enter to be anything less than equitable. Even if such a showing could be made, the state's solution stands in sharp conflict with the First Amendment's command that government regulation of speech must be measured in minimums, not maximums.
>
> The state's remaining justification—the paternalistic premise that charities' speech must be regulated for their own benefit—is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best what they want to say and how to say it.

487 U.S. at 790-91. Tellingly, here, there is no allegation that Vietnow made any complaint about the Fundraisers' fees. To the contrary, it renewed its fee arrangements with the Fundraisers in a series of successive contracts over a period of more than eight years.

3. The Attorney General's Amended Complaint Violates the First Amendment because It Improperly is Based Upon the Amount of the Fundraisers' Fees and Their Failure to Disclose Their Fee Arrangements.

The Attorney General erroneously argues that the problem with the statutes in *Riley* was their across-the-board applicability to all fee arrangements in excess of a certain percentage and that *Riley* does not limit his right to bring a common law fraud action against an individual fundraiser who earns a particular high fee. (AG Pet. at 11). To begin with, in arguing that his claim is one for common law fraud the Attorney General mischaracterizes his own Amended Complaint. He ignores that, just as in *Riley*, *Munson* and *Schaumburg*, his case is grounded on alleged statutory violations. Indeed, he claims the Fundraisers have violated not one but three statutes—the Illinois Solicitation For Charity Act, the Illinois Consumer Fraud and Deceptive Practices Act and the UDTPA.[5]

The Attorney General further errs in claiming free speech is less chilled by giving him the discretion to pick and chose which fundraisers to sue than by a blanket statutory prohibition. (AG Pet. at 12.) The Illinois Supreme Court properly rejected this argument, reasoning that this Court's teachings regarding "the government's rights to pursue 'less intrusive' measures . . . plainly meant that the government retained the right to regulate conduct of fundraisers in a manner that was 'less intrusive' of their *constitutional rights*. The present action is not 'less intrusive' . . . simply because it is an instance of individual litigation." 198 Ill.2d at 358 (emphasis in original).

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[5] Of course, the precise nature of the Attorney General's claims is difficult to determine because he did not plead each separate cause of action as a separate count as §2-603 of the Illinois Code of Civil Procedure requires. 735 ILCS 5/2-603.

The First Amendment does not permit constitutional rights to be eroded lawsuit by lawsuit. This Court has held that actions in tort which would restrict First Amendment freedoms violate the First and Fourteenth Amendments. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Board of County Comm'rs Wabaunsee County v. Umbehr*, 518 U.S. 668, 674 (1996) ("Constitutional violations may arise from the deterrent or 'chilling' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights.").

Far from permitting fraud actions based upon official discretion, *Munson* and *Riley* specifically held that these, too, were unconstitutional. The Maryland statute in *Munson* gave the Secretary of State the discretion to grant a waiver of the statute "whenever necessary." The Secretary of State argued that this made the law constitutional because she had granted such waivers in an extremely liberal manner, with special care shown for the rights of advocacy groups. 467 U.S. at 964 n.12. This Court disagreed and explained why giving a state official such discretion would threaten free speech:

> [E]ven if the Secretary of State were correct, the waiver provision were broad enough to allow for exemptions "whenever necessary," we would find the statute only slightly less troubling. Our cases make clear that a statute that requires such a "license" for the dissemination of ideas is inherently suspect. *By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech.* Under the Secretary's interpretation, charities whose First Amendment rights are abridged by the fundraising limitations simply would have traded a direct prohibition on their activity for a licensing scheme that, if it is

> available to them at all, is available only at the unguided discretion of the Secretary of State.

Id. (emphasis added).

Riley likewise stressed the dangers of allowing public officials to decide whether to restrict free speech on a case-by-case basis. While the North Carolina statute created a presumption of unreasonableness, a professional solicitor could still avoid its reach by showing to the factfinder's satisfaction that the fee was necessary. 487 U.S. at 793. As described by the state in *Riley*, the factfinder made the ultimate determination as to whether the fee was reasonable on a case-by-case basis. *Id.* This Court found this scheme to be "fundamental[ly] flawed":

> Even if we agreed that some form of a percentage-based measure could be used, in part, to test for fraud, we could not agree to a measure that requires a speaker to prove "reasonable" case by case based upon what is at best a loose inference that the fee might be too high.

Id.

Riley explained why such an arrangement could only chill free speech:

> [O]f course, in every such case, the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair. This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates.

Id. at 794.

This case illustrates these predicted dangers. The Attorney General has spent ten years litigating the fairness

of an arms-length, bargained-for fee arrangement between a charity and its fundraisers based on his arbitrary contention that the Fundraisers' gross fees are earning too much. The Fundraisers have not only had to spend vast amounts of money, time and resources fighting for their constitutional rights, but also have had to labor under the cloud that, should the Attorney General succeed, they could lose their livelihood and face financial ruin.

To uphold the Amended Complaint would place all charitable fundraisers at the mercy the Attorney General's whims. Potentially any gross fee can be called "too high." Potentially any contract or arrangement can be called "unreasonable." Every time a fundraiser contracts with a charity it would take the risk that it may lose the entire fruit of its efforts, be forced out of business, face untold amounts of punitive damages and other draconian civil and possibly even criminal penalties for its conduct. There is nothing to prevent the Attorney General from using fees as a pretext to punish those charities he does not like.

Riley held that the constitution does not permit state officials to so threaten protected speech:

> This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately "reduc[e] the quantity of expression." Whether one views this as a restriction of the charity's ability to speak, or a restriction of the professional fundraisers' ability to speak, the restriction is undoubtedly one on speech, and cannot be countenanced here.

487 U.S. at 794 (citations omitted). Here, the Attorney General is specifically asking the Court to drive the Fundraisers out of business in Illinois, (R. Vol. I, C-213), exactly what *Riley* said "cannot be countenanced." *Id.*

4. The Attorney General Seeks to Unconstitutionally Compel Protected Speech.

The Attorney General argues that the *Riley* Line of Authority permits a fraud action against the Fundraisers because they allegedly represented that monies donated would be used for Vietnow's charitable purposes but did not represent that, pursuant to their contracts with Vietnow, only 15% of the proceeds raised went to Vietnow. Contrary to the Attorney General's claim, as the Illinois Supreme Court correctly found, "the Amended Complaint is, in essence, an attempt to regulate the [Fundraisers'] ability to engage in a protected activity based upon a percentage-rate limitation. This is the same regulatory principle that was rejected in *Schaumburg*, *Munson* and *Riley*." 198 Ill.2d at 359.

Significantly, and fatal to the Amended Complaint, the Attorney General made no attempt to articulate when a fundraiser has a "duty" to disclose its fees or what standards to use to make this determination. Instead, he asks for arbitrary power that would chill speech. The Illinois Supreme Court recognized the danger of the Attorney General's approach: "Fund-raisers . . . would be at a constant risk of incurring litigation costs, as well as civil and criminal penalties, which could produce a chilling effect on protected speech, based on nothing more than a loose inference that the fee might be too high." 198 Ill.2d at 362 (internal quotation marks and citations omitted).

Along with striking down the fee schedule set forth in North Carolina's charitable solicitation statute, *Riley* also

struck down a provision of the statute which required a fundraiser to disclose the percentage of funds it kept as its fees during the prior twelve months. Just as the Attorney General does here, (AG Pet. at 11), North Carolina argued in *Riley* that the mandatory disclosure of fees was justified by the state's interest in informing donors how the money they contribute is spent to dispel what the state alleged was a misperception by donors that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity. 487 U.S. at 798. This Court held that the disclosure requirement compelled speech and was therefore a content-based restriction subject to exacting First Amendment scrutiny. *Id.* at 789. This Court found that the mandatory disclosure rule could not withstand such scrutiny because the proffered state interest was "not as weighty as the state asserts" and that "the means chosen to accomplish it are unduly burdensome and not narrowly tailored." *Id.* at 798. The Attorney General's claim not withstanding, these same concerns apply as much to a lawsuit aimed at a fundraiser's failure to disclose as to a statute.

In *Riley*, this Court recognized that donors are aware that solicitors incur costs to which part of their donation might apply. *Id.* at 799. The Attorney General never has disputed this. *Riley* also emphasized that donors are free to inquire how much of their contribution will be turned over to the charity. *Id.* Consistent with this allowable inquiry, Illinois law requires fundraisers to respond truthfully to such questions. *See* 225 ILCS 460/18(c).

Likewise, as the *Riley* Line of Authority notes, a state's legitimate interest in preventing fraud can be satisfied by methods that do not impinge on First Amendment freedoms. As *Riley* noted, a state is free to require charitable fundraisers to discharge certain financial information to the state. *Id.* at 795. As Ex. D to the Amended Complaint demonstrates, (R. Vol. I, C-68-87), Illinois requires such

disclosures and Telemarketing has complied. Indeed, that appears to be where the Attorney General obtained his figures regarding the Fundraisers' Illinois fees. (R. Vol. I, C-207-208). *Riley* also noted a state is free to publish these financial disclosure forms. *Id.* at 800. Moreover, a state may turn to its existing fraud laws where actual misrepresentations were made. *Id.*; *Munson*, 467 U.S. at 967; *Schaumburg*, 444 U.S. at 637. Here the Attorney General can point to no actual misstatement by the Fundraisers because they said nothing fraudulent or untruthful in representing that the funds raised benefited Vietnow. As a result, as discussed below, the Fundraisers' fee arrangements cannot provide the basis for fraud or breach of fiduciary duty claims.

B. The Amended Complaint Does Not State Valid Claims For Fraud or Breach of Fiduciary Duty.

The Attorney General argues that his Amended Complaint states causes of action for fraud and breach of fiduciary duty[6] based upon the facts that the Fundraisers

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[6] In the Illinois courts, the Attorney General also erroneously claimed that the Fundraisers, who solicit and receive money from the donating public, breached a fiduciary duty based upon their failure to affirmatively disclose the amount of their fees. As with fraud Illinois law imposes a disclosure obligation only upon a fiduciary with a duty to disclose. *E.g.*, *Chicago Park District v. Kenroy*, 78 Ill.2d 555, 402 N.E.2d 181 (1980). Consistent with First Amendment analysis, no such duty arises where what is not disclosed is protected speech. Moreover, even though the fundraisers in the *Riley* Line of Authority solicited and collected money from the donating public, this Court found they had a constitutional right not to disclose

(continued...)

charged gross fees that the Attorney General deems were excessive and the Fundraisers did not disclose their gross fee arrangements to potential donors. For the many reasons discussed above, these allegations violate the First Amendment.

To support his claim, the Attorney General cites a number of cases setting forth the basic elements required to plead a fraud claim. It is hornbook law however that before an omission can be the basis of a fraud claim there must be an intent to deceive "under circumstances creating an opportunity *and duty* to speak." *Perlman v. Time, Inc.*, 64 Ill.App.3d 190, 195, 380 N.E.2d 1040 (1st Dist. 1978) (emphasis supplied). *See Lidecker v. Kendall College*, 194 Ill.App.3d 309, 314, 550 N.E.2d 1121 (1st Dist. 1990); *Central States Joint Board v. Continental Assurance Co.*, 117 Ill.App.3d 600, 604, 453 N.E.2d 932 (1st Dist. 1983). The same is true to state a claim for fraudulent concealment. *See Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 500, 675 N.E.2d 584 (1996); *Hirsch v. Feuer*, 299 Ill.App.3d 1076, 1086, 702 N.E. 265 (1st Dist. 1998); *Lagen v. Lagen*, 14 Ill.App.3d 74, 79, 302 N.E.2d 201 (1st Dist. 1973).[7]

Indeed, in the cases cited by the Attorney General, fraud was found premised upon the existence of such a duty. For example, *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill.App.3d 237, 511 N.E.2d 1330 (2d Dist. 1987), (AG Pet. at 8), involved a consumer purchase of a car that was falsely represented by the seller to be new. The basis for the court's finding that the seller had misrepresented material

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(...continued)
their fees. In this Court, the Attorney General seems to have abandoned his breach of fiduciary duty claim.

[7] The *amici* States advance a similarly incorrect analysis of state fraud principles. (Amici Br. at 2-4.)

facts was the seller's *duty* to advise the purchasers that the cars previously had been sold. Likewise, in *Pence v. United States*, 316 U.S. 332 (1942), (AG Pet. at 8), an insured was found to have engaged in fraud where he made statements about his health condition for purposes of obtaining disability compensation that contradicted prior statements made in his application for reinstatement of his life insurance policy after it had lapsed for nonpayment of premiums—a condition which he had a duty to report honestly. Similarly, in *Glazewski v. Coronet Ins. Co.*, 108 Ill.2d 243, 483 N.E.2d 1263 (1985), (AG Pet. at 7, 8), a complaint alleging fraud against an insurance company was upheld where the company failed to disclose that the uninsured motorist coverage that it issued had no value, a disclosure that the insurance company had a duty to make. Indeed, in *In re Witt*, 145 Ill.2d 380, 538 N.E.2d 526 (1991), (AG Pet. at 7, 8), a judicial disciplinary proceeding, the court found the judge had not engaged in fraud because he did not have a duty to disclose on his Statement of Economic Interest a loan from a litigant which was a legitimate economic transaction.

Further, the Attorney General's reliance upon *United States v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000), (AG Pet. at 8 n.2), is particularly misplaced. In that case, the head of a company that solicited charitable donations was convicted of wire fraud and other criminal offenses based upon affirmative misrepresentations to potential donors including that they had won a fabulous prize that did not exist. Indeed, the defendant conceded that his company defrauded people. His defense, which was not accepted, was that he was not a knowing participant in the scheme.

Further, the Attorney General's and *amici* States' position that the Illinois Supreme Court's decision did not question the sufficiency of the Amended Complaint under state law and based its decision solely upon First Amend-

ment grounds is absolutely incorrect. In its recitation of the facts, the Illinois Supreme Court highlights that the Amended Complaint contains "no allegation that defendants made affirmative misstatements to potential donors." 198 Ill.2d at 348. Moreover, in concluding that the Amended Complaint is an improper attempt to regulate the Fundraisers' ability to engage in protected activity based upon a percentage rate limitation, the Illinois Supreme Court relied upon the insufficiency of the Amended Complaint under state law: "[T]he statements made by defendants during solicitation are alleged to be 'false' only because defendants retained 85% of the gross receipts and failed to disclose this information to donors." 198 Ill.2d at 359.

No matter how many ways the Attorney General tries to cast it, the result is the same. His Amended Complaint does not state a claim for fraud because the Fundraisers made no affirmative mispresentations and, as made clear by this Court's teachings in the *Riley* Line of Authority, they had no duty to voluntarily disclose the percentage of the fees they retained to potential donors. The Illinois Supreme Court recognized this deficiency and properly affirmed the dismissal of the Amended Complaint.

II. NO IMPORTANT ISSUE IS PRESENTED BY THE ILLINOIS SUPREME COURT'S DECISION WHICH IS CONSISTENT WITH THIS COURT'S PRECEDENT AND ALLOWS STATE FRAUD ACTIONS PROPERLY BASED, CONSISTENT WITH THE FIRST AMENDMENT, UPON AFFIRMATIVE MISREPRESENTATIONS.

The Attorney General's and *amici* States' claim that the Illinois Supreme Court's ruling eliminates all governmental fraud cases is disingenuous. All that is prohibited, consistent with the First Amendment, are fraud actions based upon the fundraiser's failure to affirmatively volunteer its fee arrangement. As this Court has made clear, there can

be no duty to disclose a fact about which one has a constitutional right to remain silent. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1993). ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'") (citation omitted). The *Riley* Line of Authority gives the Fundraisers that right.

The Attorney General argues that donors would not have given to Vietnow if they had known the Fundraisers' fee. But this is precisely why this Court in *Riley* found the compelled disclosure of fees to be unconstitutional:

> [T]he compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent. First, this provision necessarily discriminates against smaller and unpopular charities, which must usually rely on professional fundraisers .... Campaigns with high costs and expenses carried out by professional fundraisers must make unfavorable disclosures, with the predictable result that such solicitations will prove unsuccessful. Yet the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success. Second, in the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last word spoken as the donor closes the door or hangs up the phone. Again, the predicable result is that the professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure.

487 U.S. at 799 (emphasis added).

The Attorney General claims that the *Riley* Line of Authority left open the question "whether, and in what manner, common law fraud principles must be modified to accommodate the First Amendment in a particular factual situation." (AG Pet. at 15.) Those cases did nothing of the sort. The very point of those cases was to make clear the protections afforded professional fundraisers by the First Amendment. The Attorney General's desire to "modify" state fraud principles is simply his attempt to make an end run around these First Amendment protections.

Likewise, the Attorney General is incorrect when he claims that the Illinois Supreme Court's decision has rendered useless a state's use of its anti-fraud laws to combat solicitation fraud. To the contrary, the Fundraisers are not claiming to be immune from Illinois fraud laws. Rather, as the Illinois Supreme Court recognized and as the *Riley* Line of Authority holds, they are subject to fraud laws properly and fairly applied to instances of actionable misrepresentation. That is not what the Attorney General is doing. Rather, he is trying to twist the meaning of Illinois fraud law to apply to content—the amount of fundraisers' fees (without regard, of course, for the significant expenses associated with their solicitation)—that this Court has said is protected speech and may not be treated as a form of fraud.

That the Amended Complaint was dismissed does not, as the Attorney General and *amici* States disingenuously claim, prohibit the Attorney General from ever looking behind the use of funds solicited for a charity. If, unlike the conduct here, fundraisers engage in affirmative misrepresentation, then, consistent with the *Riley* Line of Authority, state anti-fraud provisions appropriately can be used to combat that misconduct. As a result, the imagined evils to the donating public, as described by the Attorney General and the *amici* States from affirmance of the decision below

are simply that—imagined. The Illinois Supreme Court's decision is consistent with this Court's precedent and Illinois law.

CONCLUSION

For each of the reasons set forth above, either independently or in combination, the Illinois Attorney General's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

ILLINOIS SOLICITATION FOR CHARITY ACT

225 ILCS 460/9(c). Actions for Violation of Act

Whenever the Attorney General shall have reason to believe that any charitable organization, professional fundraiser, or professional solicitor is operating in violation of the provisions of this Act, or if any of the principal officers of any charitable organization has refused or failed, after notice, to produce any records of such organization or there is employed or is about to be employed in any solicitation or collection of contributions for a charitable organization any device, scheme, or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, or any false statement has been made in any application, registration or statement required to be filed pursuant to this Act, in addition to any other action authorized by law, he may bring in the circuit court an action in the name, and on behalf of the people of the State of Illinois against such charitable organization and any other person who has participated or is about to participate in such solicitation or collection by employing such device, scheme, artifice, false representation or promise, to enjoin such charitable organization or other person from continuing such solicitation or collection or engaging therein or doing any acts in furtherance thereof, or to cancel any registration statement previously filed with the Attorney General.

In connection with such proposed action the Attorney General is authorized to take proof in the manner provided in Section 2-1003 of the Code of Civil Procedure.

225 ILCS 460/15. Statements or representations made during solicitation

(a) Trustees of charitable trusts, organizations and corporations have a duty to supervise fund raising activities to ensure that contributions are adequately protected and

devoted to the proper purpose and that statements or representations made during solicitations to the public are true and correct.

(b) If any person, including a charitable organization, a professional fundraiser or a professional solicitor, in conducting a fundraising campaign for a charitable organization or for charitable or ostensibly charitable purposes:

> (5) Engages in any public solicitation and therein purports to relate the purpose or purposes for which the funds are solicited, such shall then be fully and accurately identified to the prospective donor. If a charitable organization whose purposes include the rendering of noneducational program services intends to expend or budget more than 50% of its program service expenditures for informing or educating the public and the funds being solicited will be used for such purpose, the donor at his or her request must be told that a primary use of the program funds will be for public education.

225 ILCS 460/18. Misrepresentations of fact

In any solicitation of contributions for a charitable organization it shall be deemed a misrepresentation of fact if any person:

> (c) Who is a professional fundraiser or professional solicitor and refuses or fails to supply, upon the request of a person being solicited, the hourly rate charge or the estimated percentage or actual percentage, if known, which is to be paid to or retained by the professional fundraiser and solicitor and the amount to be paid to the charitable organization under the fundraising contract then in effect and the amount to be paid to the charitable organizations.

ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

815 ILCS 505/1. Definitions

(a) The term "advertisement" includes the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise and includes every work device to disguise any form of business solicitation by using such terms as "renewal", "invoice", "bill", "statement", or "reminder", to create an impression of existing obligation when there is none, or other language to mislead any person in relation to any sought after commercial transaction;

(b) The term "merchandise" includes any objects, wares, goods, commodities, intangibles, real estate situated outside the State of Illinois, or services;

(c) The term "person" includes any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

(d) The term "sale" includes any sale, offer for sale, or attempt to sell any merchandise for cash or on credit.

(e) The term "consumer" means any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household.

(f) The terms "trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(g) The term "pyramid sales scheme" includes any plan or operation whereby a person in exchange for money or other thing of value acquires the opportunity to receive a benefit or thing of value, which is primarily based upon the inducement of additional persons, by himself or others, regardless of number, to participate in the same plan or operation and is not primarily contingent on the volume or quantity of goods, services, or other property sold or distributed or to be sold or distributed to persons for purposes of resale to consumers. For purposes of this subsection, "money or other thing of value" shall not include payments made for sales demonstration equipment and materials furnished on a nonprofit basis for use in making sales and not for resale.

815 ILCS 505/2. Unlawful practices

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

UNIFORM DECEPTIVE TRADE PRACTICES ACT

815 ILCS 510/2. Acts constituting deceptive trade practice

(a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:

(1) passes off goods or services as those of another;

(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;

(4) uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) represents that goods or services are of a particular standard, quality, or grade or that goods are a particular style or model, if they are of another;

(8) disparages the goods, services, or business of another by false or misleading representation of fact;

(9) advertises goods or services with intent not to sell them as advertised;

(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

(b) In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.

(c) This Section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.